No. 89-1436

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., AND MFR COURT STREET BOOKS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
EDWARD S. G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, before it may enforce compliance with a grand jury subpoena for corporate business records, the government must establish that the subpoenaed materials would be relevant and admissible at a trial on the merits.

PARTIES TO THE PROCEEDING

In addition to the named parties, Model Magazine Distributors, Inc., was a party in the courts below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 884 F.2d 772. Earlier opinions of the court of appeals (Pet. App. 16a-18a and 19a-56a) are reported, respectively, at 844 F.2d 202 and 829 F.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1989. A petition for rehearing was denied on December 12, 1989 (Pet. App. 68a-69a). The petition for a writ of certiorari was filed on March 12, 1990, and was granted on June 11, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 17 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (c) **For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. Since 1986, a grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to Model Magazine Distributors, Inc. (Model), and two related companies, respondents R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR).[1] The subpoenas sought a variety of corporate books and records. See Pet. App. 3a, 70a-82a. The grand jury subsequently issued two further

[1] The government had earlier sought to subpoena certain corporate records and videotapes in the possession of Model and another company, but the court of appeals had held those subpoenas to be too broad and too vague, and had refused to compel compliance with the subpoenas. See Pet. App. 19a-56a.

subpoenas to Model. The first called for additional business records; the second requested one copy of each of 193 identified videotapes that Model had shipped into the Eastern District of Virginia. *Id.* at 83a-84a; see *id.* at 4a.

2. Respondents moved to quash the subpoenas. Following extensive hearings in the United States District Court for the Eastern District of Virginia, the motions to quash were denied.

First, on June 17, 1988, Judge Hilton denied Model's motions to quash. Pet. App. 57a-58a. The court found that the two subpoenas for business records were sufficiently specific. *Ibid.* It also upheld the subpoena for the 193 videotapes, concluding that the tapes were relevant to the government's investigation and that production of the tapes would not constitute a prior restraint. *Ibid.*

Second, on July 8, 1988, Judge Cacheris denied the motion by R. Enterprises to quash the subpoena for business records. Pet. App. 59a-60a. The court found that the subpoena was "clearly delineated and not overly burdensome." *Id.* at 59a. The court also found a "sufficient connection" between R. Enterprises and the Eastern District of Virginia to warrant "further investigation by the grand jury." *Id.* at 60a. In particular, the court noted that Martin Rothstein, the owner of R. Enterprises, had admitted that R. Enterprises, MFR Books, and Model were "all the same thing." *Ibid.*

Finally, on August 12, 1988, Judge Ellis denied MFR's motion to quash the subpoena for business records. Pet. App. 61a-64a. The court stated that it was "inclined to agree" with "the majority of the jurisdictions," which do not require the government to make "a threshold showing" before a grand jury subpoena may be enforced. *Id.* at 63a. The court added, however, that "even assuming that the Fourth Circuit would require a threshold showing of relevance," the government had made such a showing in

this case. *Ibid.* The court found sufficient evidence that respondents were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Ibid.* The court also found the subpoena to be appropriately "tailored." *Ibid.* Characterizing the subpoenas in this case as "fairly standard business subpoenas," which "ought to be complied with," *id.* at 65a, the district court denied the motion to quash. When the companies thereafter refused to comply, the court found them in contempt. *Id.* at 64a.

3. The court of appeals affirmed in part, reversed in part, and remanded in part. Pet. App. 1a-15a. Relying on *United States* v. *Nixon*, 418 U.S. 683, 700 (1974), the court held that, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, the government must "clear three hurdles" in order to secure the enforcement of a grand jury subpoena: "(1) relevancy; (2) admissibility; (3) specificity." Pet. App. 7a.[2] The court emphasized that unless grand jury subpoenas are held to such a threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." *Id.* at 9a. "The test for enforcement," the court explained, "is whether the subpoena constitutes 'a good faith effort to obtain identified evidence rather than a general "fishing expedition" that attempts to use the rule as a discovery device.' " *Ibid.* In order not to "undercut[] the strict limitation of discovery in criminal cases," *ibid.*, the court held that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial," *id.* at 10a.

Applying those standards, the court first upheld the subpoenas to Model for business records. Pet. App. 7a-8a.

[2] The court of appeals recognized that the *Nixon* Court was reviewing a trial subpoena, not a grand jury subpoena, but it found the "interpretation of Rule 17(c)" articulated in the *Nixon* case "equally applicable in this case. Pet. App. 7a n.2.

It found the requested records to be sufficiently relevant because they would "most likely reveal whether the company's business dealings in Virginia resulted in the sale and or distribution of allegedly obscene materials in the state." *Id.* at 8a. In addition, the court had no doubt of "the necessity of a subpoena to obtain those records, as logically they are available only from the company itself." *Ibid.*

The court, however, quashed the subpoenas for the business records of MFR and R. Enterprises. Pet. App. 8a-10a. The court explained that the government had adduced no evidence that those companies had done business in the Eastern District of Virginia; the court therefore "fail[ed] to see how the records of those companies are relevant to a grand jury investigation" in the district. *Id.* at 9a. In addition, the court stated, any evidence of activities by the target companies outside the State of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Id.* at 10a. Accordingly, the court held, the subpoenas "fail to meet the requirement[] that any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." *Ibid.*

Finally, the court remanded Model's motion to quash the subpoena for videotapes. Pet. App. 10a-15a. The court held that the subpoenaed films were not shown to be obscene and that the government had failed to establish the relevance of the films to the grand jury's investigation. *Id.* at 12a-14a & n.4. It also noted that there were "additional means for obtaining these tapes other than the issuance of a subpoena duces tecum and an *in camera* review by the district court." *Id.* at 13a.[3]

[3] Although we disagree with the portion of the court of appeals' decision addressing the subpoena for the videotapes, we have not sought review of that portion of the court of appeals' judgment. Instead, we have sought review only of the ruling quashing the subpoenas for repondents' business records.

On December 12, 1989, the panel denied the government's petition for rehearing. By a vote of 6 to 5, the full court of appeals denied rehearing en banc. Pet. App. 68a-69a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that two grand jury subpoenas for business records had to be quashed because the government failed to show that the subpoenaed documents were "admissible as evidence at trial." Pet. App. 10a. The court based its decision on Rule 17(c) of the Federal Rules of Criminal Procedure, which permits the recipient of a grand jury subpoena duces tecum to move to quash the subpoena on the ground that "compliance would be unreasonable or oppressive."

The court of appeals' decision is both unprecedented and unwise. By requiring the government to prove the relevance of materials subpoenaed by the grand jury—and, to make matters worse, by requiring it to prove that the materials would be admissible at trial—the court below overlooked the unique role of the grand jury in our criminal justice system. Because the court of appeals' novel standard for grand jury subpoenas is inconsistent with the decisions of this Court and threatens to disrupt the ordinary operation of grand jury investigations, the judgment of the court of appeals should be reversed.

A. This Court has identified three general principles applicable to litigation involving grand jury issues. First, the rules and restrictions that apply at trial on the merits do not apply in the same way (and, in some cases, do not apply at all) to grand jury proceedings. Second, because the purpose of a grand jury investigation is to explore whether a crime has been committed and, if so, who has committed it, the precise nature of the offense, if any, is often not

clear until the evidence has been examined and the grand jury has reached the end of its task. Third, in order to discharge its functions the grand jury must not be sidetracked by ancillary litigation over questions such as the admissibility of evidence.

B. In resolving Rule 17(c) motions to quash grand jury subpoenas, most courts have been properly attentive to these general principles. They have held that the government has no duty to make a preliminary showing of relevance before it may secure compliance with a grand jury subpoena for non-privileged materials. And they have adopted a highly deferential standard of relevance. As articulated by several courts, that standard requires the subpoena to be upheld unless the recipient can prove that the requested materials bear "no conceivable relevance" to "any legitimate object of investigation by the federal grand jury."

Other courts—incorrectly, we believe—have imposed on the government the burden to prove that subpoenaed material is relevant to the grand jury investigation. That approach cannot be squared with this Court's grand jury decisions. Still less justified is the standard imposed by the court of appeals in this case, under which the government must prove that the subpoenaed materials would be relevant and admissible at a trial on the merits. Indeed, the Advisory Committee that drafted Rule 17(c) expressly considered but rejected a requirement that subpoenaed materials be found admissible before they could be inspected by the parties. And First Amendment principles do not support the court of appeals' decision—even if, as respondents contend, the decision could be confined to subpoenas for records related to activities protected by the First Amendment.

C. In moving to quash the subpoenas for corporate records in this case, respondents asserted that they had

done no business in the Eastern District of Virginia and that the subpoenaed material was therefore irrelevant to the grand jury investigation. Those allegations do not demonstrate that the information sought bears no conceivable relevance to any legitimate grand jury inquiry. In the first place, the grand jury was not required to accept respondents' assertions on faith, but was instead entitled to examine the evidence for itself. But even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation, since the records might serve other valid purposes—such as shedding light on the activities of, and the relationships among, all the individuals and companies under investigation in this case.

ARGUMENT

THE COURT OF APPEALS ERRED IN QUASHING THE GRAND JURY SUBPOENAS SEEKING RESPONDENTS' CORPORATE RECORDS

A. The Rules Regarding Compliance With Grand Jury Subpoenas Must Be Guided By The Broad Investigative Responsibilities Of The Grand Jury

Under Rule 17(c) of the Federal Rules of Criminal Procedure, a court may quash or modify a subpoena "if compliance would be unreasonable or oppressive." See also *United States* v. *Calandra*, 414 U.S. 338, 346 n.4 (1974) (Rule 17(c) applies to grand jury subpoenas). As the Court has explained in a related setting, however, "what is reasonable depends on the context" in which a claim is made. *New Jersey* v. *T.L.O.*, 469 U.S. 325, 337 (1985). In defining the right to be free from an "unreasonable" subpoena—as in any other case in which "reasonableness" is the standard—"the specific content and incidents of this right must be shaped by the context in which it is asserted." *Wyman* v. *James*, 400 U.S. 309, 318 (1971) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968)).

In the case of grand jury subpoenas, the meaning of "unreasonable" and "oppressive" must take account of the role of the grand jury in our criminal justice system—and, in particular, its broad investigative responsibilities. "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments," a grand jury's "investigative powers are necessarily broad." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). While the powers of the grand jury are not unlimited, "the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, * * * is particularly applicable to grand jury proceedings." *Ibid.* Accord *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973).

The Court has articulated three related principles designed to ensure that the grand jury can fulfill its broad investigative and accusatory mandate. These three principles inform the meaning of the terms "unreasonable or oppressive" in Rule 17(c) as applied to grand jury subpoenas.

First, the Court has held that the rules and restrictions that apply at a trial on the merits do not apply in the same way to grand jury proceedings. Because it has "[t]raditionally * * * been accorded wide latitude to inquire into violations of criminal law," the grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). Unlike a trial on the merits, "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Ibid.* Accordingly, "[i]ts work is not circumscribed by the technical requirements governing the

ascertainment of guilt once it has made the charges that culminate its inquiries." *United States* v. *Johnson*, 319 U.S. 503, 510 (1943).

For example, in *Calandra*, the Court held the Fourth Amendment exclusionary rule inapplicable to grand jury proceedings. "Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." 414 U.S. at 349. Moreover, the Court emphasized, "[s]uppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Ibid.*

Similarly, in *Costello* v. *United States*, 350 U.S. 359 (1956), the Court refused to apply the rule against hearsay to grand jury proceedings. The Court noted that the American grand jury system derives from the English model, under which the work of the grand jury "was not hampered by rigid procedural or evidential rules." *Id.* at 362. In the English system, grand jurors "could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory." *Ibid.* To impose the rule against hearsay on the grand jury process would "run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.* at 364.

In *United States* v. *Washington*, 431 U.S. 181 (1977), the Court again distinguished between the rules applicable to trial and those applicable to the grand jury. The Court held that the government did not violate the Fifth Amendment when it warned a witness in front of the grand jury of his right to remain silent. Rejecting the contention that the warning should have been given outside the grand jury

room, the Court explained that "this argument entirely overlooks that the grand jury's historic role is as an investigative body; it is not the final arbiter of guilt or innocence." *Id.* at 191. A witness's rights before the grand jury, the Court observed, are not the same as his rights at trial. Unlike in the grand jury, "it is well settled that invocation of the Fifth Amendment privilege * * * is not admissible in a criminal trial, where guilt or innocence is actually at stake." *Ibid.*

Second, the Court has emphasized that the rules applicable to grand jury proceedings must take into account the breadth of the grand jury's investigative responsibilities. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg* v. *Hayes*, 408 U.S. at 701. It is often impossible to predict at the outset the course that the investigation will follow. Thus, "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Applying that principle, the Court has consistently held that the scope of the grand jury's inquiries cannot be confined by rules that depend, in any respect, on the outcome of the grand jury's efforts.

For example, in *Hale* v. *Henkel*, 201 U.S. 43 (1906), the Court rejected the contention that a witness may not be questioned prior to the return of an indictment. The Court explained that "[i]t is impossible to conceive that * * * the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." *Id.* at 65. Accord *United States* v. *Dionisio*, 410 U.S. at 16.

More recently, in *Branzburg* v. *Hayes*, *supra*, the Court rejected the contention that before a grand jury may subpoena a reporter for his source of information, the government must show that a crime has occurred and that the information is not available elsewhere. The Court explained that "only the grand jury itself can make this determination," in that the grand jury's role "includes an investigatory function with respect to determining whether a crime has been committed and who committed it." 408 U.S. at 701. "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made." *Id.* at 701-702. As the Court summarized the point in *Blair* v. *United States*, 250 U.S. at 282, the scope of a grand jury investigation "is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

Third, the Court has emphasized that, in order to discharge its functions, the grand jury should not be interrupted by procedural detours. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. at 17. Accord *United States* v. *Calandra*, 414 U.S. at 350. As the Court explained in *Costello*, if a grand jury's work could be challenged on the grounds of adequacy or competence, "the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." 350 U.S. at 363.

B. A Grand Jury Subpoena May Not Be Quashed On Relevance Grounds Unless The Recipient Demonstrates That The Materials Bear No Conceivable Relevance To Any Legitimate Subject of Grand Jury Inquiry

In resolving Rule 17(c) motions to quash grand jury subpoenas, most courts have taken close account of the foregoing principles. Applying those principles, the courts have generally held that the government has no duty to make a preliminary showing of relevance before it may secure compliance with a grand jury subpoena for non-privileged materials.[4] Instead, they have placed the burden on the recipient of the subpoena to prove that the request is improper. And most courts have held that burden to be an exacting one: as the Second and Sixth Circuits have held, the recipient must show that the materials bear no conceivable relevance to any legitimate subject of grand jury inquiry.

By contrast, the Third and Tenth Circuits have held that the government, not the subpoena recipient, bears the burden to prove relevance to the grand jury investigation. Imposing that burden on the government cannot be squared with this Court's grand jury decisions. Still less justified is the standard imposed by the Fourth Circuit in this case, under which the government must prove that the subpoenaed materials would be relevant and admissible at a trial on the merits.

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[4] In some cases, "a constitutional, common-law, or statutory privilege" (*Branzburg* v. *Hayes*, 408 U.S. at 688) may entitle the subpoena recipient to decline production. See, *e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 444-445 (1972) (Fifth Amendment); *Gelbard* v. *United States*, 408 U.S. 41, 46-51 (1972) (protection under 18 U.S.C. 2515 against unlawful wiretaps); *Fisher* v. *United States*, 425 U.S. 391, 402-405 (1976) (attorney-client privilege); *In re Sealed Case*, 676 F.2d 793, 808-811 (D.C. Cir. 1982) (work-product privilege). No such privilege applies in this case.

1. Although the courts of appeals describe the standard in different ways, a majority impose a heavy burden on the subpoena recipient to demonstrate the impropriety of the grand jury's request. In *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327, 329 (1984), for example, the Sixth Circuit refused to quash a grand jury subpoena seeking "[a]ll books, papers, records, memoranda, and data" relating to certain discretionary bank accounts controlled by a former union official. The court rejected the official's contention that the government should be required to demonstrate the relevance of the requested records. Instead, the court explained, "[t]he burden is on the party seeking to quash the subpoena to show 'that the information sought bears "no conceivable relevance to any legitimate object of investigation by the federal grand jury,' " * * * or that there has been 'harassment or prosecutorial misuse of the system.' " *Id.* at 330.[5]

The Second Circuit follows the same rule. In *In re Liberatore*, 574 F.2d 78 (1978), the recipient of a grand jury subpoena duces tecum seeking handwriting exemplars and fingerprints contended that the government should be required to show the relevance and necessity of that information to the grand jury's investigation. After noting that the target had not preserved the issue for appeal, the court went on to reject the claim on the merits. The court explained that "the government does not in each and every case bear the constant burden of initially showing the relevance of the particular evidence sought to be produced by way of subpoena." *Id.* at 83. "Instead," the court continued, "the party seeking to quash a subpoena must carry the burden of showing that the information sought bears

[5] See also *In re Grand Jury Proceedings, John Doe (Weiner)*, 754 F.2d 154, 155-156 (6th Cir. 1985) (government need not make a showing of necessity before securing compliance with subpoena duces tecum to target's lawyer).

'no conceivable relevance to any legitimate object of investigation by the federal grand jury.' " *Ibid.*[6]

Other circuits, while not employing the "conceivable relevance" test by its terms, have likewise declined to require the government to make a preliminary showing of relevance in order to enforce a grand jury subpoena duces tecum. In *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983), for example, the recipient of a documents subpoena resisted production, contending that the government should first be required to show "that the documents sought are relevant to an investigation properly within the grand jury's jurisdiction and not sought primarily for another purpose." 691 F.2d at 1387. The Eleventh Circuit rejected that claim and enforced the subpoena. Although the trial court had made no finding "that the documents sought were relevant or necessary for the grand jury's investigation," the court of appeals refused to devise any such requirement "absent some showing of

[6] See also *In re Grand Jury Subpoena Served Upon Doe (Roe)*, 781 F.2d 238, 248 (2d Cir. 1985) (en banc) (in rejecting claim that the government must show a need for information it subpoenas from the attorney of a target, the court stated: "To allow a grand jury target to challenge the subpoena on the basis of a 'need' requirement would seriously jeopardize the secrecy of the proceeding and the grand jury's investigative functions"), cert. denied, 475 U.S. 1108 (1986); *In re Grand Jury Subpoena Served Upon Horowitz*, 482 F.2d 72, 80 (2d Cir.) (with respect to documents dated at or about the time of the transactions at issue, the recipient of a grand jury subpoena must show "that a particular category of documents can have no conceivable relevance to any legitimate object of investigation by the federal grand jury"), cert. denied, 414 U.S. 867 (1973); *In re Grand Jury Subpoena Duces Tecum to John Doe Corp.*, 570 F. Supp. 1476, 1479-1480 (S.D.N.Y. 1983); *In re Grand Jury Subpoena Served Upon New York Law School*, 448 F. Supp. 822, 823-824 (S.D.N.Y. 1978); *In re Morgan*, 377 F. Supp. 281, 284 (S.D.N.Y. 1974).

harassment or prosecutorial misuse of the system." *Ibid.* To do so, the court reasoned, would "impose [an] undue restriction[] upon the grand jury investigative process." *Ibid.*

The Ninth Circuit has also refused to impose on the government the requirement to make a threshold showing of relevance or necessity. For example, in *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (1983), a grand jury issued a subpoena to the former attorney of a target, seeking documents relating to the previous representation. The district court quashed the subpoena, stating that the government must first establish, by affidavit, the "legitimate need and relevance" of the requested information. *Id.* at 1222. The court of appeals reversed, holding that "[n]o affidavit of relevance and need must be introduced." *Id.* at 1223. The court explained that "[i]n view of the presumption that the government obeys the law * * * [there is] no reason to inject into routine grand jury investigations the delay and imposition upon district courts that will be opened up by a rule institutionalizing these disclaiming affidavits." *Ibid.*[7]

We believe those courts have employed the correct analysis—allocating the burden of proof to the recipient, and adopting a standard of relevance that respects the broad investigative functions of the grand jury. A rule requiring the subpoena recipient, rather than the government, to prove that compliance with the subpoena would be "unreasonable or oppressive" is faithful to the traditional approach of assigning the burden of proof to "the party asserting the affirmative of a proposition." *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir.), cert.

[7] Accord *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977); *In re Grand Jury Proceedings*, 707 F. Supp. 1207, 1216 (D. Haw. 1989).

denied, 444 U.S. 866 (1979).[8] Moreover, assigning that burden to the recipient gives force to the presumption of regularity that generally attaches to grand jury proceedings. See *Hamling* v. *United States*, 418 U.S. 87, 139 n.23 (1974); *United States* v. *Johnson*, 319 U.S. 503, 512-513 (1943) ("burden" of challenging grand jury proceedings "would rest heavily on defendants"); *United States* v. *Mechanik*, 475 U.S. 66, 75 (1986) (O'Connor, J., concurring in the judgment) ("The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process").[9] And by requiring the recipient to bear the burden of proof, courts may diminish the occasions on which grand jury proceedings will be interrupted by "minitrials and preliminary showings" that interfere with the grand jury's work. *United States* v. *Dionisio*, 410 U.S. at 17.

It is also proper for courts to uphold grand jury subpoenas unless the requested documents lack any conceivable relevance to a legitimate subject of grand jury inquiry.[10] If the grand jury may initiate an investigation

[8] See also *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.*, 178 F.2d 541, 547 (9th Cir. 1949); *Reliance Life Ins. Co.* v. *Burgess*, 112 F.2d 234, 237-238 (8th Cir.), cert. denied, 311 U.S. 699 (1940); *In re Chicken Antitrust Litigation*, 560 F. Supp. 1006, 1008 (N.D. Ga. 1982); *Kalkowski* v. *Ronco, Inc.*, 424 F. Supp. 343, 353 (N.D. Ill. 1976).

[9] See also *United States* v. *Torres*, 901 F.2d 205, 232-233 (2d Cir. 1990); *First Nat'l Bank* v. *United States Department of Justice*, 865 F.2d 217, 219 (10th Cir. 1989); *United States* v. *McKie*, 831 F.2d 819, 821 (8th Cir. 1987); *In re Grand Jury Proceedings: Subpoenas Duces Tecum*, 827 F.2d 301, 304 (8th Cir. 1987); *United States* v. *Azad*, 809 F.2d 291, 295 (6th Cir. 1986), cert. denied, 481 U.S. 1004 (1987).

[10] That rule is consistent with this Court's decisions involving the permissible scope of administrative and congressional investigative subpoenas. See *McPhaul* v. *United States*, 364 U.S. 372, 381 (1960)

without having to satisfy any threshold evidentiary standard, as this Court has held, it would make no sense to impose such a standard indirectly by devising an exacting relevance requirement as a condition on the grand jury's exercise of its process. A standard of "conceivable relevance" is appropriate because it parallels the grand jury's authority to look into any conduct involving conceivable criminality. Under that standard, the scope of a grand jury subpoena will not be cabined by an unduly narrow prediction of the future course of the grand jury's investigative efforts. Unless the trial court is persuaded that there is no legitimate investigation to which the subpoenaed materials might relate, it must enforce the subpoena by its terms.

2. By narrowly confining the scope of relevance objections, the standard set forth above properly construes not only the words "unreasonable or oppressive" in Rule 17(c); it is also faithful to the remaining text of the rule. Rule 17(c) authorizes a court to quash a subpoena if "compliance" would be unreasonable or oppressive. By emphasizing "compliance," the rule focuses principally on the burdensomeness of production, not on the relevance of the materials requested. Indeed, the rule states that the trial court may permit the subpoenaed materials to be inspected "upon their production," without anywhere suggesting that a preliminary showing of relevance (let alone admissibility) is required.

(records subpoenaed by congressional subcommittee "were not 'plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties' "); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (evidence subpoenaed by the Secretary of Labor "was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties"). See also *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) (with respect to an administrative subpoena, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant").

The history of Rule 17(c) confirms the point. The first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, included as Rule 45 a provision for subpoenas modeled after the civil rules. See 2 M. Rhodes, *Orfield's Criminal Procedure Under The Federal Rules* § 17:2, at 684 (2d ed. 1985). The draft rule lacked any provision for pretrial production and inspection of subpoenaed materials. See Tent. Draft (Sept. 8, 1941).[11] To remedy that shortcoming, the Advisory Committee added a new sentence, providing for pretrial *production* of subpoenaed materials. At the same time, however, the new sentence conditioned pretrial *inspection* of the materials upon a finding by the trial court that the materials were admissible. Thus amended, the rule (then Rule 59, in Tent. Draft 2 (Jan. 2, 1942)) provided that "[t]he court in its discretion may direct that books, papers, or documents designated in the subpoena shall be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production determine their admissibility in evidence and may permit such portions thereof as may be found admissible to be inspected by the respective parties and their attorneys."

At a session on May 19, 1942, the Advisory Committee explicitly rejected the requirement that subpoenaed materials must be found to be admissible before they would be available for inspection. Mr. Dean explained that a court could not determine the admissibility of subpoenaed material in advance of trial, since "[t]hat would depend in many cases on what witness is on the stand, and so forth." 5/19/42 Tr. 459. Dean accordingly proposed

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[11] Copies of all materials cited in this paragraph and the next have been lodged with the Court for its convenience and have been provided to respondents' counsel. The originals are housed in the Archives.

that instead of admissibility, the rule require only "relevancy to the cause or to the case generally." *Ibid.* Another member of the Committee, Mr. Burns, went further, proposing that the Committee "take away that power" altogether. *Ibid.* "[T]o pass on legal questions in advance of trial," Burns stated, "would seem to me to be a concept that does not have any basis [i]n the needs of the defendant or the Government." *Ibid.* Burns therefore proposed that the language requiring a finding of admissibility be deleted from the text of the rule. Tr. 460. The other members readily agreed, and the motion to delete the admissibility requirement passed unanimously. Tr. 461.[12]

3. The "no conceivable relevance" test ordinarily will be satisfied only where the subpoenaed materials range so far afield as to suggest an abuse of the grand jury process. If, for example, the materials have been subpoenaed solely to prepare an indictment for trial,[13] or to inquire into civil matters,[14] or to promote some other improper end,[15] a

[12] The members of the Advisory Committee wondered aloud how the language requiring admissibility had ever been added to the proposed rule. 5/19/42 Tr. 460. One member hypothesized that the language was suggested by "[o]ne of the members of the Subcommittee on Style." *Ibid.* (Holtzoff). In the Committee's view, the object of a motion to quash was to relieve the movant "of the oppressive character of a subpoena, of calling for the production of several carloads of books, papers, and records"; on the other hand, "the determination of the admissibility" was "something new." *Ibid.* (Dean).

[13] See *United States* v. *Gibbons*, 607 F.2d 1320, 1328 (10th Cir. 1979); *United States* v. *Beasley*, 550 F.2d 261, 266 (5th Cir.), cert. denied, 434 U.S. 863 (1977); *United States* v. *Fisher*, 455 F.2d 1101, 1104-1105 (2d Cir. 1972); *In re Eight Grand Jury Subpoenae Duces Tecum*, 701 F. Supp. 53, 55 (S.D.N.Y. 1988).

[14] See *In re Wood*, 430 F. Supp. 41, 47 (S.D.N.Y. 1977); *United States* v. *Doe*, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972).

[15] See, *e.g.*, *Brown* v. *United States*, 245 F.2d 549 (8th Cir. 1957).

court may properly grant a Rule 17(c) motion to quash. Conversely, however, allegations of "no conceivable relevance" that fall short of genuine grand jury abuse cannot justify an order quashing a subpoena—even if the subpoena is quite broad or seeks materials that have no obvious connection with criminal conduct. See, *e.g.*, *In re Grand Jury Subpoenas Duces Tecum Addressed to Certain Executive Officers of M.G. Allen & Assoc.*, 391 F. Supp. 991, 1008 n.8 (D.R.I. 1975); *In re Grand Jury Subpoenas Duces Tecum Addressed to Corrado Bros.*, 367 F. Supp. 1126, 1132 (D. Del. 1973).[16]

4. The Third Circuit, joined more recently by the Tenth Circuit, has not followed the principles set forth above. Instead, those courts have required the government, in the first instance, to justify a subpoena duces tecum on relevance grounds. See *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 92-93 (3d Cir. 1973); *In re Grand Jury Subpoena Duces Tecum Issued on June 9, 1982*, 697 F.2d 277, 281 (10th Cir. 1983). In *Schofield I*, the Third Circuit, exercising its "supervisory power," required the government to make a preliminary showing, by affidavit, that each item requested by the grand jury is "at least relevant to an investigation being conducted by the

[16] Of course, a subpoena recipient cannot make out a claim of "no conceivable relevance" on the strength of merely conclusory allegations. *In re Grand Jury Investigation (Jackson)*, 696 F.2d 449, 451 (6th Cir. 1982). See also *Universal Mfg. Co.* v. *United States*, 508 F.2d 684, 685 (8th Cir. 1975). Cf. *United States* v. *Johnson*, 319 U.S. at 512-513. In order to justify further inquiry into the matter by the court, a subpoena recipient must make a substantial showing from which the court can conclude that the subpoena is improper. Cf. *Franks* v. *Delaware*, 438 U.S. 154, 155, 170, 171 (1978).

grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." 486 F.2d at 93.[17]

By requiring the government to make a preliminary showing of relevance, the Third Circuit's "Schofield" rule violates this Court's injunction that grand jury proceedings not be interrupted by procedural detours. Under the "Schofield" rule, the government in each case involving a grand jury subpoena duces tecum must identify the nature of the grand jury investigation and explain how the subpoenaed materials would be relevant to that investigation. Apart from the inevitable delay, such preliminary showings needlessly compromise "the indispensable secrecy of grand jury proceedings," *United States* v. *Johnson*, 319 U.S. at 513, and afford grand jury targets a form of premature discovery nowhere contemplated by the Rules of Criminal Procedure.

Besides being inconsistent with the principles of grand jury procedure set forth in this Court's decisions, the "Schofield" rule finds no support in the language or policies underlying Rule 17(c). The "Schofield" rule therefore cannot be justified either as a construction of

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[17] Most circuits have rejected the Third Circuit's "Schofield" rule. See *In re Grand Jury Proceedings (85 Misc. 140)*, 791 F.2d 663, 665 (8th Cir. 1986); *In re Sinadinos*, 760 F.2d 167, 169 (7th Cir. 1985); *In re Grand Jury Subpoena (Battle)*, 748 F.2d at 330 (Sixth Circuit); *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d at 1387 (Eleventh Circuit); *In re Pantojas*, 628 F.2d 701, 704-705 (1st Cir. 1980); *In re Liberatore*, 574 F.2d at 83 (Second Circuit); *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d at 686 (Ninth Circuit). See also *Schofield II*, 507 F.2d at 968 (Adams, J., concurring) (the "Schofield" rule "seem[s] to undercut the holding by the Supreme Court in *Dionisio*"); *id.* at 969 (Aldisert, J., dissenting) (the "Schofield" rule constitutes a "major deviation" and "radical departure" from the holding in *Dionisio* that "no preliminary showing by the government is required").

Rule 17(c) or as an extension of the common law of grand jury procedure.

Finally, the "Schofield" rule cannot be justified as an exercise of the court's "supervisory power," the source of authority that the Third Circuit invoked when it created the rule. Courts may not use the supervisory power to create a rule that is contrary to statute or court rule. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-256 (1988); *United States* v. *Hasting*, 461 U.S. 499, 505-507 (1983). And the supervisory power is not an excuse to disregard the balance of interests already defined by this Court in constitutional rulings. See *United States* v. *Payner*, 447 U.S. 727, 734-736 (1980). Moreover, a court's exercise of the supervisory power, which is normally confined to formulating rules to govern proceedings before it, cannot lightly be invoked to direct the functioning of an investigative entity whose independent status is expressly recognized in the Fifth Amendment. See *United States* v. *Chanen*, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977); *United States* v. *Pabian*, 704 F.2d 1533, 1536-1537 (11th Cir. 1983); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1458-1462 (1984).

5. Like the rule in the Third and Tenth Circuits, the Fourth Circuit's decision in the present case imposes a threshold obligation on the government to establish the relevance of the subpoenaed records. But the decision below goes well beyond the Third and Tenth Circuit precedents. To satisfy the court of appeals' standard, the government must prove that the requested documents are relevant not merely to the grand jury's investigation, but also to the likely charges at trial. No other court of appeals

has taken so restrictive a view of the grand jury's subpoena power.[18]

The court of appeals' decision violates each of the three principles governing the role and responsibility of the grand jury. First, the decision holds the grand jury to the same standards of relevance and admissibility that apply at trial.[19] In the court's view, "any documents subpoenaed under Rule 17(c)"—whether subpoenaed by a grand jury during its investigation, or subpoenaed by the government after indictment and in preparation for trial—"must be admissible as evidence at trial" (Pet. App. 10a). Applying that standard, the court quashed the subpoenas to R. Enterprises and MFR, concluding that evidence of activities outside of Virginia "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* That standard ignores the distinction between the grand

[18] In contrast to the court below, the Third Circuit requires only a modest showing of relevance. For example, in *In re Grand Jury Empanelled Oct. 18, 1979 (Hughes)*, 633 F.2d 282 (1980), the court found that the government had demonstrated the relevance of documents subpoenaed by the grand jury when it represented, by affidavit, that "the grand jury was conducting an investigation into specific federal crimes," that the requested documents would be relevant to that investigation, and that the information was not sought for an unrelated purpose. *Id.* at 287. The court noted that even a "cryptic" affidavit may satisfy the government's obligation under *Schofield I*. *Ibid.* See also *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d at 967.

[19] The court of appeals construed Rule 17(c) in the grand jury context as if the "admissibility" language deleted by the Advisory Committee had in fact been adopted. But the language was deliberately eliminated; and "[f]ew principles of statutory construction are more compelling than the proposition that [a legislative committee] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See generally *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935).

jury and trial settings, and it imposes on the grand jury process a rule of relevance that has no place in the investigative context.[20]

[20] The court of appeals' reliance on *United States* v. *Nixon*, 418 U.S. 683 (1974), reflects its failure to distinguish grand jury proceedings from the trial on the merits. The *Nixon* case was plainly concerned only with *trial* subpoenas—in particular, a trial subpoena issued by the Watergate special prosecutor. See, *e.g.*, *id.* at 698-699 (the "chief innovation" of Rule 17(c) subpoenas is the fact that they "expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials") (emphasis omitted); *id.* at 699 (articulating the prerequisites for obtaining materials "prior to trial") Indeed, in deciding to order the release of the subpoenaed records, the Court in *Nixon* described as "[t]he most cogent objection" to production the contention that the records were "a collection of out-of-court statements" and were "therefore inadmissible hearsay." *Id.* at 700. Hearsay objections, of course, have no application within the grand jury. See *Costello* v. *United States*, 350 U.S. 359 (1956).

Equally mistaken was the court of appeals' suggestion that, without a strict standard of relevance under Rule 17(c), grand jury subpoenas might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." Pet. App. 9a. Rule 16 provides the government with reciprocal discovery rights, but only in connection with the trial process. Thus, Rule 16(b)(1)(A) permits the government to discover from the defendant documents and tangible objects "which the defendant intends to introduce as evidence in chief at the trial." Similarly, Rule 16(b)(1)(B) authorizes the discovery of reports of examinations and tests "which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony." In short, the government's right to discovery under Rule 16 is triggered only after indictment (and, for that matter, only after the defendant has made his own discovery request under Rule 16 and the government has complied with that request, see Rule 16(b)(1)). If, as the court below supposed, Rule 17(c) forbids the grand jury to obtain materials that would otherwise be subject to Rule 16, there would be no means for the grand jury to secure such evidence at all, prior to the issuance of an indictment.

Second, the "trial relevance" standard adopted by the court of appeals depends on the outcome of the grand jury's work—who will be charged as defendants, and what the charges will be. But until the grand jury completes its investigation—and issues an indictment, if it so chooses—a court cannot know whether there will even *be* a trial, let alone what materials will be relevant at any such trial. See *Blair* v. *United States*, 250 U.S. 273, 282 (1919). The outcome of a grand jury investigation is often difficult to predict at the beginning or in the middle. A standard that depends on the outcome of the investigation is therefore unworkable as applied to decisions that must be made early in the process. To paraphrase one of this Court's administrative subpoena cases, a district court should not condition enforcement of a grand jury subpoena upon the grand jury's "first reaching and announcing a decision on some of the issues in [its] * * * proceeding." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. at 509.

Moreover, a standard of trial relevance disregards the principle that a grand jury's inquiry may be based entirely on general suspicion and may begin without any particular offense as its object. As this Court has noted, the grand jury "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). See also *United States* v. *Bisceglia*, 420 U.S. 141, 147-148 (1975); *United States* v. *Powell*, 379 U.S. 48, 57 (1964). A requirement of trial relevance is obviously misplaced in a setting in which there may not be any clearly developed theory of criminality against which the question of trial relevance can be measured.

Finally, by affording targets a ready vehicle for challenging subpoenas—one that requires the government

to show relevance and admissibility—the court of appeals has created a new means for delaying grand jury investigations. Targets of a grand jury investigation ordinarily have every incentive to disrupt or delay the investigation, particularly since ligitation-related delays do not toll the running of the statute of limitations. In addition, targets have an interest in obtaining information about the government's case. Indeed, trial practice guides for defense counsel specifically refer to the tactical advantages of grand jury motions that result in delays and disclosures of information.[21] This Court's cases, however, strongly counsel against measures that would permit such "undue interruption [of] the inquiry instituted by a grand jury." *Cobbledick* v. *United States*, 309 U.S. 323, 327 (1940). To hold otherwise, this Court has observed, would "make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing." *United States* v. *Johnson*, 319 U.S. 503, 512 (1943).

6. In their brief in opposition to the certiorari petition in this case, respondents defended the court of appeals' novel standard on First Amendment grounds. Br. in Opp. 6-10. The court of appeals, however, did not invoke First Amendment principles in quashing the subpoenas for respondents' business records. What the court said is that "any" record subpoenaed by the grand jury—whether or not related to First Amendment activity—"must be admissible as evidence at trial." Pet. App. 10a. The court of

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[21] See, *e.g.*, 1 A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 172 (1984); 1 S. Allen, I. Rosen, D. Winston & K Kruskal, *Criminal Defense Techniques* § 6A.02[5] (1988); B. Gershman, *Prosecutorial Misconduct* §§ 2.1-2.9 (1985); National Lawyers Guild, *Representation of Witnesses Before Federal Grand Juries* § 13.4(b) (3d ed. 1985).

appeals' decision therefore sweeps broadly and is not confined in the way respondents suggested.

In any event, First Amendment principles do not support the court of appeals' decision—even if, as respondents have contended, the decision could be confined to subpoenas for records related to protected First Amendment activities. The First Amendment does not ordinarily protect routine corporate business records.[22] Although respondents assert that the business records subpoenas directed to them will "inevitably chill the exercise of free expression" (Br. in Opp. 9), they have offered no support for that prediction. And "[b]are allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole* v. *Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

As this Court explained in *Branzburg* v. *Hayes*, 408 U.S. at 682, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." To the contrary, the Court has "held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with

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[22] Cf. *In re A Witness Before the Special October 1981 Grand Jury (Manner)*, 722 F.2d 349, 352-353 (7th Cir. 1983) (grand jury subpoena for patient records of cancer treating foundation did not violate free association rights); *United States* v. *Coates*, 692 F.2d 629, 633-634 (9th Cir. 1982) (Internal Revenue Service summons for corporate minute books of a church results in only an incidental burden on religion and is therefore enforceable); *United States* v. *Grayson County State Bank*, 656 F.2d 1070, 1073-1074 (5th Cir. 1981) (IRS summons for bank records of a church did not impermissibly chill the exercise of religion), cert. denied, 455 U.S. 920 (1982); *United States* v. *Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979) (IRS summons to church pastor for books of account, bank records, and lists of contributors upheld against free exercise and free association claims).

speech do not thereby become subject to compelling-interest analysis under the First Amendment." *Employment Div., Dep't of Human Resources* v. *Smith*, 110 S. Ct. 1595, 1604 n.3 (1990).

For example, in *Branzburg* the Court held that the First Amendment does not shield a reporter from having to answer a grand jury's questions concerning an ongoing criminal investigation. Similarly, in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), the Court held that the press does not enjoy a First Amendment immunity from search warrants issued upon a traditional finding of probable cause. See also *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986) (no special exemption for adult bookstore from municipal ordinance banning places of prostitution); *New York* v. *P.J. Video, Inc.*, 475 U.S. 868 (1986) (no special exemption for video store from the probable cause standard for search warrants); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969) (no special exemption for the press from antitrust divestiture rules); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) (no special exemption for newspaper publisher from subpoena issued by the Secretary of Labor); *Associated Press* v. *United States*, 326 U.S. 1 (1945) (no special exemption for the press from the antitrust laws); *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) (no special exemption for the press from the labor laws).[23]

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[23] See also *SEC* v. *McGoff*, 647 F.2d 185 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981) (upholding subpoena issued by the Securities and Exchange Commission for corporate records relating to transactions with South Africa); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 989 (3d Cir. 1985) (Garth, J., concurring), cert. denied, 474 U.S. 1055 (1986).

A grand jury subpoena for corporate records is, likewise, a "generally applicable" order "unconcerned with regulating speech" and having, at most, "the effect of interfering with speech." Accordingly, the recipient of such a subpoena is not entitled to special protection under the First Amendment. *Employment Div., Dep't of Human Resources* v. *Smith*, 110 S. Ct. at 1604 n.3. First Amendment principles therefore do not support the court of appeals' requirement that the government establish trial relevance in order to sustain a grand jury subpoena.

C. Because Respondents Did Not Carry Their Burden Of Proof, The Grand Jury Subpoenas Should Have Been Enforced

In moving to quash the subpoena for corporate records in this case, respondent R. Enterprises asserted that it had done "absolutely no business in Virginia and [had] no contact with that state whatsoever," and that it would therefore be "a gross abuse of process to require that company to produce all of its records before a grand jury in the Easter[n] District of Virginia." C.A. App. A349 (6/28/88 Fahringer affidavit). See also 7/8/88 Tr. 2-3, 6; Resp. Br. in Opp. 5. Respondent MFR Court Street Books made much the same argument, alleging that it had done "no interstate business," and that the grand jury subpoena was therefore not "relevant to any obscenity investigation of criminal activity in the Eastern District of Virginia." C.A. App. 496, 499 (7/19/88 Schwarz affidavit). See also 8/12/88 Tr. 9-10; Br. in Opp. 5.

Those allegations do not demonstrate "that the information sought bears 'no conceivable relevance to any legitimate object of investigation by the federal grand jury.' " *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978). In the first place, the grand jury was not required to accept respondents' assertions on faith, but was instead entitled

to examine the evidence for itself. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). Respondents' challenge to the subpoenas required the trial court to prejudge the very matters that the grand jury was investigating—whether, and to what extent, respondents and their confederates were violating the obscenity laws within the Eastern District of Virginia and elsewhere. Allegations that can be confirmed or denied only by making "forecasts of the probable result of the investigation," *Blair* v. *United States*, 250 U.S. at 282, cannot constitute a sufficient showing of unreasonableness under Rule 17(c).

In any event, even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation. At a minimum, the records might demonstrate a pattern of obscenity violations, including violations in other States, and thus constitute evidence of knowledge and intent on the part of Martin Rothstein (respondents' owner). As the district court found, Rothstein owned not only the respondent companies but also Model Magazine, which *did* conduct business in Virginia. See Pet. App. 60a; Fed. R. Evid. 404(b).[24] Alternatively, the out-of-state acts might con-

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[24] See *United States* v. *Jardina*, 747 F.2d 945, 952 (5th Cir. 1984) (evidence of counterfeit note-passing in Texas admissible to prove intent in prosecution for passing counterfeit notes in Louisiana), cert. denied, 470 U.S. 1058 (1985); *United States* v. *Bailleaux*, 685 F.2d 1105, 1110-1112 (9th Cir. 1982) (evidence of extortion in Oregon admissible to prove *modus operandi* and intent in prosecution for extortion in California); *United States* v. *Weaver*, 565 F.2d 129, 134 (8th Cir. 1977) (evidence of robbery of Arizona bank admissible to prove identity in prosecution for robbing bank in Arkansas), cert. denied, 434 U.S. 1074 (1978). See also *United States* v. *Nolan*, 551 F.2d 266, 270-271 (10th Cir.) (British conviction admissible to prove knowledge and intent in prosecution for importing narcotics from India to Kansas), cert. denied, 434 U.S. 904 (1977).

stitute overt acts in a conspiracy, properly chargeable in Virginia, involving Rothstein or Model Magazine.[25] Or, the out-of-state acts might prove that respondents or their principals aided and abetted obscenity violations committed in Virginia by either Rothstein or Model Magazine.[26]

In short, respondents did not carry their burden of proof under the appropriate standard: they did not show "that the information sought bears 'no conceivable relevance to any legitimate object of investigation by the federal grand jury.' " *In re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978). The decision of the district court denying respondents' motions to quash the subpoenas was therefore correct and should have been upheld on appeal.

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[25] See *United States* v. *Long*, 866 F.2d 402, 407 (11th Cir. 1989) (where several of defendant's co-conspirators committed overt acts in Alabama, defendant was properly convicted of conspiring within that State); *United States* v. *Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988) (where two of defendant's co-conspirators committed overt acts in Montana, defendant was properly convicted of conspiring in that State); *United States* v. *Scaife*, 749 F.2d 338, 346 (6th Cir. 1984) (where two of defendants' co-conspirators committed overt acts in the Western District of Tennessee, defendants were properly convicted of conspiring in that district); *United States* v. *Fahnbulleh*, 748 F.2d 473, 477 (8th Cir. 1984) (where two of defendant's co-conspirators committed overt acts in Arkansas, defendants were properly convicted of conspiring in that State), cert. denied, 471 U.S. 1139 (1985).

[26] See *United States* v. *Long*, 866 F.2d at 407-408 (defendant was properly convicted of aiding and abetting the possession of counterfeit obligations in Alabama, even though she never entered that State).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S. G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

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